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Supreme Court, U.S.
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No. 01-1618

IN THE

Supreme Court of the United States

MICHAEL ABBELL AND WILLIAM MORAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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RULE

Fed. R. Crim. P. 23(b) 1

REPLY BRIEF

In the petition, we showed that the Eleventh Circuit's decision – approving the district court's invasive probe of the jury's deliberations and subjective evaluation of patently conflicting evidence, and affirming its dismissal of a juror for "just cause," Fed. R. Crim. P. 23(b) – conflicts with decisions of the Second, D.C., and Ninth Circuits and is wholly inconsistent with decisions of this Court. The government sees no conflict. That, however, is because it has closed its eyes to the holdings of the circuits in conflict and to the necessary implications of this Court's decisions mandating the preservation of the secrecy of jury deliberations.

1. **The Conflict Among The Courts Of Appeals.** Petitioner and the government agree that a juror's refusal to follow the law constitutes "just cause" for dismissal under Fed. R. Crim. P. 23(b), and that a juror may not be dismissed based on his or her doubts about the sufficiency of the government's evidence. Neither the parties nor the courts of appeals agree, however, about (i) the process used to investigate accusations of internal juror misconduct related to the merits of a case, or (ii) the standard by which such allegations should be assessed.

Here, the Eleventh Circuit approved the district court's interrogations of all 12 jurors about deliberations, some more than once, in assessing whether juror misconduct had occurred. It also affirmed the district court's subjective assessment of the record based on its credibility determinations about conflicting juror testimony. Finally, the court of appeals held that a juror may be excused "when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence," App. 25a, and concluded that the lower court's application of that test here was not clearly erroneous.[1]

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[1] While the government's recitation of the underlying facts is incomplete, it does not take issue with petitioners' description of the facts. There is no dispute that Juror Alfonso's initial statement was that she did

At the outset of its brief, the government leaps over the fundamental foundational questions of whether a district court may interrogate jurors about deliberations and whether the test for assessing evidence of misconduct is subjective or objective. Instead, the government commences by defending the Eleventh Circuit's conclusion that the record evidence is sufficient to support the district court's decision that there was no "'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to the RICO conspiracy." App. 26a-27a (footnote omitted). This is not the correct standard, and it was clearly erroneous to reach such a conclusion based on the record in this case. See Pet. 6-8; App. 63a-168a; *infra* at 9. The critical point for determining whether to grant the petition for *certiorari*, however, is that the government is attempting to obscure the important legal questions presented by the petition – *viz.*, whether the district court lawfully can probe jury deliberations in this way and whether the standard for evaluating the evidence is subjective or objective.

a. The government's first response mischaracterizes petitioners' argument that the Second, D.C., and Ninth Circuits forbid district courts confronted with allegations of juror misconduct to interrogate jurors about the deliberations. Specifically, the government says that petitioners "err in contending that *Symington*, *Thomas*, and *Brown* preclude the questioning of jurors to decide whether removal is

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not have to follow the law (not that she would not) and that following the judge's re-instruction of the jury, Juror Alfonso never again made any such statement. Nor does the government dispute that Juror Alfonso testified that she would follow the law and that a number of jurors testified that she was deliberating. Moreover, the statements of the individual jurors regarding Juror Alfonso, when viewed in their entirety, are far less clear than the government would have this Court believe. For example, Juror Blanton, leader of the faction of jurors pressuring others for conviction, Pet. 7-8, claimed that Juror Alfonso was not deliberating, but he also admitted that one morning she spoke to the other jurors for over an hour regarding her views of the case, *id.* at 6.

appropriate." Opp. 13 (citation omitted).[2] Of course, that is not petitioners' argument. Petitioners, like the Second Circuit, recognize and freely acknowledge that there are many situations in which a judge assessing whether there is "just cause" to dismiss a juror may question jurors during deliberations:

> Evidence of the nature and extent of a juror's unavailability, or incapacitation, for example, is ordinarily available without inquiring into the substance of deliberations. In such instances, the judge is free to conduct a thorough examination of the basis for removal – a basis that is itself unlikely to be confused with a juror's views of the sufficiency of the evidence – and to make appropriate findings of fact, including determinations of the credibility of the juror in question. [*United States* v. *Thomas*, 116 F.3d 606, 620 (2d Cir. 1997) (citations omitted).]

Similarly, "claims of partiality or bias often arise from some event, or from a relationship between a juror and a party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process." *Id.* at 621 (giving numerous examples).

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[2] *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987); *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999).

In its recent decision in *United States* v. *Edwards*, 2002 WL 1967951 (5th Cir. Aug. 13, 2002), the Fifth Circuit in *dicta* appears to endorse the approach adopted by the *Thomas*, *Brown*, and *Symington* courts. Though there is some confusion in the language used by the *Edwards* court, it explains that the *Thomas-Brown-Symington* test prohibits any probing of juror deliberations, *id.* at *23-*24. Under this standard, the Fifth Circuit would not have allowed the juror interrogations that occurred here. (The Fifth Circuit did not apply the test in *Edwards*, because it affirmed the dismissal of the juror not for nullification, but rather for importing and exporting materials to and from the jury room and testifying falsely about it. *Id.* at *22-*24.)

The crucial point, however, is that "[w]here . . . as here, a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations." *Id.* As the Second Circuit explained:

> There is no allegedly prejudicial event or relationship at issue, nor is the court being asked to assess whether a juror is so upset or otherwise distracted that he is unable to carry out his duties. Rather, to determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations. [*Id.*]

After analysis of the competing interests, the Second Circuit adopted a heightened evidentiary standard for assessing whether a juror is refusing to follow the law and expressly held that its standard would "serve[] to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations," because "a presiding judge faced with anything but *unambiguous* evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal." *Id.* at 622 (emphasis supplied). The court concludes with language expressly forbidding precisely what occurred in this case:

> A lower evidentiary standard would encourage the court faced with ambiguous evidence of such impropriety to investigate further, eliciting testimony from jurors until enough evidence surfaced to affirm or reject allegations of juror nullification. One unavoidable consequence of imposing a lower evidentiary standard would thus be to open up the possibility that judges, in response to the demands of counsel or otherwise, would wind up taking sides in disputes between jurors on allegations of juror nullification – in effect, to permit judicial interference

> with, if not usurpation of, the fact-finding role of the jury. [*Id.* (emphasis supplied).]

The D.C. Circuit, too, has made clear that the type of juror probing authorized by the Eleventh Circuit violates Rule 23(b) and the Constitution. In *Thomas*, the Second Circuit relied on the D.C. Circuit's statement that "unless the initial request for dismissal [based on a juror's unwillingness to follow the law] is transparent, the court will likely prove unable to establish conclusively the reasons underlying it." *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). That is because the court may not "delve deeply into a juror's motivations" for fear of "intrud[ing] on the secrecy of the jury's deliberations." *Id.* See also *United States* v. *Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999) (quoting *Brown*, 823 F.2d at 596).[3]

It is disingenuous to argue, as the government does, that the Second, D.C., and Ninth Circuits would allow the probe conducted in this case. The questioning authorized here was neither reasonable nor limited. Based on a note, the district court conducted a four-day investigation, interviewing all jurors about the statements, opinions, and conduct of jury members. The questioning addressed the substance and process of the deliberations and required jurors to reveal mental impressions and opinions related to the deliberations. As ambiguities about Juror Alfonso's statements and conduct developed in the record, the court expanded rather than halted

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[3] The government's other citations are inapt. *See United States* v. *Baker*, 262 F.3d 124, 131-32 (2d Cir. 2001) (dismissing juror based on her acknowledged decision on the merits prior to deliberations and refusal to participate in deliberations); *United States* v. *Reed*, 167 F.3d 984, 991 (6th Cir. 1999) (in a case not involving juror dismissal, holding that the district court's *Allen* charge was not coercive where the issue "focused solely on juror behavior and the ability of jurors [who were antagonistic] to deliberate impartially"); *United States* v. *Barone*, 114 F.3d 1284, 1305-07 (1st Cir. 1997) (dismissing juror who learned that the defense attorney had represented the juror's cousin).

its probe. The Eleventh Circuit's tepid, belated statement that lower courts should err on the side of too little inquiry instead of too much is meaningless in this context. Its decision plainly conflicts with those of the other courts of appeals.

b. The government also claims that that there is no conflict about whether the test for assessing a juror's alleged misconduct is objective or subjective and, specifically, about whether a district court may weigh credibility in making the misconduct determination. Again, the government is simply wishing away the analysis in the courts of appeals' decisions. In *Thomas*, the Second Circuit described the conflicting testimony from jurors about Juror No. 5. Without purporting to assess the relative credibility of the jurors or to weigh the conflicting evidence, the court held that it "cannot say that it is beyond doubt that Juror No. 5's position during deliberations was the result of his defiant unwillingness to apply the law, as opposed to his reservations about the sufficiency of the Government's case against the defendants." 116 F.3d at 624. Similarly, in *Brown*, the court did not weigh the juror's testimony, but simply noted that it "create[d] an ambiguous record," 823 F.2d at 597, and therefore that it had been error to dismiss him. Finally, in *Symington*, the court held that in light of the ambiguous record, the juror could not be discharged. 195 F.3d at 1092. In each case, once the court determined that the record was ambiguous, it held that the juror in question could not be discharged – a purely objective determination.

Neither case the government cites in support of the proposition that a district court may make credibility determinations in assessing internal juror misconduct applies here. In *United States* v. *Baker*, the juror was *not* removed for "refusal to base her vote on the evidence – a reason that is dangerously difficult to distinguish from a refusal to view the evidence as viewed by the other jurors – but rather for her refusal to engage in the process of jury deliberation." 262 F.3d 124, 132 (2d Cir. 2001). Thus, the court of appeals

affirmed the district court's finding that a juror refused to participate in deliberations based on the juror's "admi[ssion that] she had made up her mind before deliberations started, she refused to participate in the exchange of views with other jurors, and she said she would continue to refuse to participate." *Id.* *United States* v. *Barone* is even less relevant. There, the First Circuit affirmed the dismissal of a juror based not on his refusal to follow the law or any internal consideration, but rather based on a finding that he was influenced by extra-record evidence. 114 F.3d 1284, 1306-07 (1st Cir. 1997).

Finally, the government wholly misapprehends the petitioners' purpose in citing *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). That case, as the government states, holds that when a district court is deciding a motion for judgment as a matter of law under Fed. R. Civ. P. 50, it must draw all inferences in favor of the moving party and may not make credibility judgments. *Id.* at 150. Petitioners do not assert that *Reeves* is directly applicable here, Opp. 12. Instead, petitioners contend that when deciding a Rule 23(b) motion based on a juror's alleged refusal to follow the law, the district court should use the standard developed under Fed. R. Civ. P. 50 to analyze the record evidence and determine whether there is any "reasonable possibility" that the juror's position was due to his or her views on the merits of the case. That familiar approach would easily be administered by trial judges. Moreover, it essentially describes what the Second, D.C., and Ninth Circuits did in assessing the record evidence in *Thomas*, *Brown*, and *Symington* and best serves the constitutional interests embodied in Rule 23(b). To avoid intrusive probing, such an objective test is critical.

Here, any objective assessment of the record results in the conclusion that, at the very least, there was a "possibility" or a "reasonable possibility" that Juror Alfonso's position was based on her view of the merits of the government's case.

See Pet. 6-9. Plainly, the Eleventh Circuit did not require an objective treatment of the record to assess its ambiguity. Equally plainly, it authorized the district court to determine which jurors among the twelve were credible and which were not, making clear to the remaining jurors where the judge's sympathies lay. Finally, the court of appeals compounded these errors by affording only deferential clearly-erroneous review to the district court's subjective assessment of the record. This approach is wholly inconsistent with that taken by the Second, D.C., and Ninth Circuits, and that conflict warrants this Court's review.

c. Third, the government contends that the Eleventh Circuit's "substantial possibility" standard is the equivalent of the other circuits' "any possibility" and "any reasonable possibility" standards. The government correctly states that "it is always possible to speculate that a juror's position is based on the insufficiency of the government's evidence." Opp. 11. From this, the government, again correctly, concludes that the "any possibility" standard must encompass only possibilities that are not purely speculative. The government then posits that a "substantial possibility" is simply one that is not purely speculative, and triumphantly concludes that all of the standards are the same.

The problem lies in the last step of this syllogism. A substantial possibility encompasses a range of probabilities far broader than those that are merely "not speculative." A requirement that a record demonstrate a substantial possibility that the juror's position is based on his or her view of the evidence is certainly more demanding than a requirement that a record demonstrate any non-speculative possibility. But to move beyond semantic quibbling, the proof is in the pudding. This record is, at the least, patently ambiguous; several jurors subjectively believed that Juror Alfonso was following the court's instructions, while others did not. After re-instruction, all jurors testified that Juror Alfonso did not say that she did not have to follow the court's instructions; and Juror Alfonso

herself testified that she was following the law. See Pet. 7. The conclusion that this record reveals no "possibility" or "reasonable possibility" that Juror Alfonso's position was based on her view of the merits does not comport with a commonsense understanding of that standard.

This Court should grant the petition to resolve the conflict on the important federal questions presented by this case.

2. **The Tension With This Court's Decisions.** The government distinguishes *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Brasfield* v. *United States*, 272 U.S. 448 (1926), by pointing out that the cases arose in different contexts – a point petitioners themselves made in describing the cases. The government simply ignores petitioners' actual point – that the analysis in these cases is utterly inconsistent with the Eleventh Circuit's authorization of the probe of jury deliberations and its affirmance of the dismissal of a deliberating juror based on the district court's subjective assessment of the record and lenient standard for discharge.

The government fails to respond to the argument that if an inquiry into the jury's numerical division is "coercive" and likely to exert "an improper influence upon the jury," *Brasfield*, 272 U.S. at 450, then *a fortiori*, interrogations of all jurors during deliberations about the statements and conduct of other jurors with respect to, and in the course of, those deliberations is coercive and improper. Nor does the government address the unmistakable implication of *Tanner* that inquiry into the internal deliberations of a jury is prohibited, which is essential to preservation of the secrecy of such deliberations. See Pet. 23-24. Finally, the government does not address the relationship between the rule adopted by the Eleventh Circuit and the purposes served by maintaining the secrecy of jury deliberations – to wit, the danger that disclosure poses to the deliberative process, *id.* at 24-25, and the influence of judicial questioning upon deliberations, *id.* at 25-26. This Court's decisions reflect that "long-recognized and very substantial concerns support the protection of jury

deliberations from intrusive inquiry," *Tanner*, 483 U.S. at 127. The Eleventh Circuit's interpretation of Rule 23(b) is indifferent to those concerns and their constitutional origin. The government's response – that those cases are not this case – does not address the principles underlying this Court's authority, let alone the force of those principles when applied in the context presented here.

3. **The Issue Presented Is Of National Importance.** The government does not dispute that the uniform, correct interpretation of Rule 23(b) is of central importance to the administration of justice and federal constitutional rights. Nor does the government deny that the issue of the proper test for dismissing a juror for alleged nullification arises with some frequency not only in the federal courts, but also in state courts. See Pet. 19 n.5.

The secrecy of jury deliberations and the accused's right to a unanimous verdict by an impartial verdict are both implicated by the erroneous rule of law adopted by the Eleventh Circuit in this case. A district court's temptation to a lenient approach to juror discharge may be great in light of increasing caseloads and the prospect of retrial; only a stringent application of Rule 23(b) can eliminate this incentive, and maintain public confidence in the secrecy of jury deliberations and their freedom from any appearance of judicial manipulation. Moreover, in light of the current conflict, only this Court can establish a uniform, bright-line rule that protects the fundamental constitutional interests at stake.

CONCLUSION

For the reasons set forth above and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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